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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 742

BERTHA MEYER SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 47–58) is reported in 67 F. (2d) 412.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 6, 1933 (R. 58). A petition for rehearing was denied December 11, 1933 (R. 59). The petition for writ of certiorari was filed January 25, 1934, and was granted March 5, 1934 (R. 63). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an authorization for deduction of premiums from pay or deposit executed by a sailor on December 3, 1917, kept in force until his death on June 30, 1921, a contract of war risk insurance without premium deductions having been made or premiums having been otherwise paid after his discharge from his first enlistment on March 17, 1918, and without renewal of the authorization for premium deductions or any other action affecting the insurance during two subsequent periods of continuous naval service beginning March 18, 1918, and September 16, 1919, in which he received his pay in full.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra*, pp. 34–50.

STATEMENT

The complaint filed by petitioner in the District Court of the United States for the District of Oregon in May 1929 alleged that the United States issued to Elias Melvin Zimmerman on December 3, 1917, a contract of war risk insurance of which petitioner, the mother of the insured, was the designated beneficiary and that by reason of an authorization for deduction of premiums from pay or deposit the insurance was in force on June 30, 1921, when Zimmerman died (R. 1–3).

A jury was waived by agreement in open court (R. 23) and it was stipulated that the sole question in controversy was whether the insurance was in force at the time of the insured's death (R. 23).

There is no dispute as to the pertinent facts. As stipulated (R. 29–31) and as found by the District Court (R. 23–26) they are as follows:

Zimmerman served three enlistments in the United States Navy—March 18, 1914, to March 17, 1918; March 18, 1918, to September 15, 1919; September 16, 1919, to his death on June 30, 1921—and was the holder of a continuous service certificate (R. 23, 29).

War-risk insurance in the sum of $10,000 was issued to Zimmerman on an application executed December 3, 1917, containing the following authorization (R. 23–24, 29–30):

> I authorize the necessary monthly deduction from my pay, or if insufficient, from any deposits with the United States in payment of the premiums as they become due, unless they be otherwise paid.

Deductions were made from Zimmerman's pay during his first enlistment, the last deduction covering the premium due for the month of April 1918 (R. 25, 30). After his first enlistment the insured did not renew his authorization for the deduction of premiums; no deductions were made, and the premiums were not otherwise paid (R. 25, 30).

Zimmerman was entitled to pay for each and every day from March 18, 1914, to the date of his death on June 30, 1921 (R. 24, 30). When he was discharged from his first enlistment on March 17, 1918, he was paid all money then due him, and when he was discharged from his second enlistment on September 15, 1919, he was paid all money due him at that time. The pay due Zimmerman at the time of his death was paid to his mother, the petitioner (R. 30).

In addition to the facts stipulated, the only evidence introduced was a deposition given on behalf of the Government by Lieutenant Dismukes, who stated that he had official access to the records of enlisted men of the United States Navy and that the records relating to the enlistments of Zimmerman disclosed that Zimmerman had never made any allotment for war-risk insurance premiums other than the authorization for deduction of premiums at the time of his application for insurance, although twelve members of the U.S.S. "Conestoga" (on which Zimmerman was serving at the time of his death) (R. 24) were shown by the records to have executed allotments for the payment of war-risk insurance premiums (R. 32).

The District Court entered judgment for petitioner (R. 27). While it rendered no opinion, some of its findings and its conclusions of law indicate that the District Court considered that the

authorization for deduction of premiums from pay or deposit, pursuant to which deductions were made during the first enlistment after its execution on December 3, 1917, kept the insurance in force until Zimmerman's death on June 30, 1921, because of the insured's continuous service, and that it was not necessary for the insured to renew the authorization in either of the two subsequent enlistments (R. 25–26).

On appeal the judgment for the petitioner was reversed by the Circuit Court of Appeals for the Ninth Circuit (R. 47–58), which held that the authorization for deduction of premiums from service pay ceased to be effective with the expiration on March 17, 1918, of the enlistment in which it was executed, and further that (R. 57):

> * * * the insured, by accepting the money which the appellee now claims should have been appropriated to the payment of the premium of the war risk insurance, in effect consented to an abandonment of his policy for his acceptance of the money which belonged to the government, if the insurance was in effect, cannot be considered otherwise than as a consent to the abandonment of the contract of insurance on his part and an agreement that the policy should be considered as lapsed.

The court therefore ruled that the insurance was not in effect when the insured died on June 30, 1921 (R. 57–58).

ARGUMENT

THE AUTHORIZATION FOR DEDUCTION OF PREMIUMS FROM PAY WAS OF NO EFFECT AFTER THE ENLISTMENT IN WHICH IT WAS GIVEN, AND, THEREFORE, THE INSURANCE LAPSED FOR NONPAYMENT OF PREMIUMS

In determining whether the insurance in question had lapsed when the insured died on June 30, 1921, we are not concerned with the premiums accruing during the period of the insured's first enlistment. These premiums were deducted by the Navy Department from the insured's pay pursuant to the authorization contained in his application for insurance. But commencing with the insured's second enlistment and continuing through his third enlistment until the date of his death, the Navy Department made no further deduction of premiums from the insured's pay, nor were the premiums otherwise paid, and so far as the record discloses no action of any kind was taken by the insured indicative of a desire or an intention to continue his insurance. Petitioner contends, however, that the insurance nevertheless remained in force because it was the duty of the Navy Department during the subsequent enlistments to deduct the premiums pursuant to the authorization which the insured had given during the first enlistment, and that the premiums should therefore be treated as having been paid because the service of the insured from the date of the authorization until his death was continuous and there was available during all of this period sufficient pay which the Navy Depart-

ment could have utilized to pay the premiums of the insured as they became due. The Government contends, on the other hand, that the authorization for deduction of premiums had no effect after the enlistment in which it was given and that the situation was not changed because the insured was a continuous-service man.

The Act authorizing the issuance of war risk insurance to the personnel of the Army and Navy upon application (Act of October 6, 1917), hereinafter called the War Risk Insurance Act, provided that the Director of the Bureau of War Risk Insurance, subject to the general direction of the Secretary of the Treasury, should execute, administer, and enforce the provisions of the Act and should "for that purpose have full power and authority to make rules and regulations, not inconsistent with the provisions of [the] Act, necessary or appropriate to carry out its purposes", which "regulations, unless the context [of the Act] otherwise requires, shall or may be made by the director, subject to the general direction of the Secretary of the Treasury" (Sec. 13, *infra,* p. 34). By Section 402 of the Act (*infra,* p. 35) the Director was required, subject to the general direction of the Secretary of the Treasury promptly to "determine upon and publish the full and exact terms and conditions of such contract of insurance." By Section 404 (*infra,* p. 35), it was provided that the insurance should be yearly renewable term insurance,

and the duration of the insurance, in the absence of maturity or lapse for nonpayment of premiums, was fixed at five years after the date of the termination of the War as declared by Proclamation of the President, when the insured was required to convert the term insurance into other forms of insurance.

The section then provided that—

> Regulations shall provide for the right to convert into ordinary life, twenty-payment life, endowment maturing at age sixty-two and into other usual forms of insurance and shall prescribe the time and method of payment of the premiums thereon, but payments of premiums in advance shall not be required for periods of more than one month each and may be deducted from the pay or deposit of the insured or be otherwise made at his election.

By the use of the word "thereon" in the clause giving the Director authority to regulate "the time and method of payment of the premiums thereon" it would seem that Congress had reference to the converted insurance referred to in the immediately preceding clause.

However, acting apparently upon the assumption that he had the authority either under the clause just referred to or under the general power given him to determine upon and publish the full and exact terms and conditions of the contract of insurance, the Director of the Bureau, nine days after the War Risk Insurance Act was passed, by Bulletin No. 1 (*infra*, pp. 36–37) prescribed a form

of contract of insurance which contained the following provision:

> Premiums shall be paid monthly on or before the last day of each calendar month and will, unless the insured otherwise elects in writing, be deducted from any pay due him/her from the United States or deposit by him/her with the United States, and, if so to be deducted a premium when due will be treated as paid, whether or not such deduction is in fact made, if upon the due date the United States owe him/her on account of pay or deposit an amount sufficient to provide the premium, provided that the premium may be paid within 31 days after the expiration of the month, during which period of grace the insurance shall remain in full force. If any premium be not paid, either in cash or by deduction as herein provided, when due or within the days of grace, this insurance shall immediately terminate, but may be reinstated within six months upon compliance with the terms and conditions specified in the regulations of the bureau.

The Bulletin also stated that—

> In case the applicant does not desire the premium to be deducted from his/her pay (or his/her deposit) he/she should so elect in writing at the time of making application; but if no election is made it shall have the effect to provide for such deduction from his/her pay, or if such pay be insufficient, any balance from his/her deposit.

Although obviously not required under this regulation in order to permit the deduction of premiums from pay or deposit (*United States* v. *Barry*, 67 F. (2d) 763, 764 (C.C.A. 6th)), there was printed in the form of application for insurance the following paragraph (R. 20):

> I authorize the necessary monthly deduction from my pay, or if insufficient, from any deposit with the United States, in payment of the premiums as they become due, unless they be otherwise paid.

It is upon this paragraph of the application, which the Government accepted by the issuance of the contract of insurance, that the petitioner relies for continuing the insurance during two successive reenlistments until the death of the insured on June 30, 1921. The position of the petitioner is that by virtue of Bulletin No. 1 the duration of this authorization was coextensive with the duration of the contract of insurance, even if the contract should remain in effect because not sooner converted, until five years after the War, and even if several periods of reenlistment may have intervened during the interim, provided, of course, there was sufficient pay due the insured on each premium due date to cover the premium.

This contention, it seems to us, misconceives the real purpose of the provisions of Bulletin No. 1 relating to the deduction of premiums from pay or deposit. The insurance was made available to the

entire personnel of the Army and Navy. Many were located in camps a long distance from Washington; many were at the battle fronts in France and other countries. War conditions had delayed communication and transportation. In consequence, the men frequently did not receive their pay with the same degree of regularity as prevailed in peace times. Confronted with this situation the Director did a very logical and natural thing. He provided in his Regulation an elective method of paying the premiums in cash or by an assignment by the insured of a portion of his monthly pay. Then, to take care of the situation where the insured had elected to have the premiums paid by deductions from pay or deposit but the paymaster through neglect or inadvertence and through no fault of the insured had failed to make the deduction, the Director provided that, "if so to be deducted, a premium when due will be treated as paid, whether or not such deduction is in fact made, if upon the due date the United States owe him/her on account of pay or deposit an amount sufficient to provide the premium." If the deduction could not be made because there was insufficient pay or deposit to cover the premium on the due date thereof, and if the premium was not paid in cash within the grace period of 31 days, the Regulation provided that the insurance should immediately terminate.

Now it is perfectly obvious, it seems to us, that there is not a word in these provisions of Bulletin No. 1 which fixes the duration of an authorization for the deduction of premiums from pay or deposit. Indeed, the very nature of the subject matter with which the Director was dealing, pay of the Army and Navy, would have made any such Regulation inexpedient if not impossible, particularly with reference to the enlisted personnel.

In the first place, by the very Act which gave the Director authority to fix the terms and conditions of the contract of insurance, the Secretary of the Navy and the Secretary of War were given full power to prescribe the conditions and limitations of allotments of pay and deposit by enlisted men. Thus Section 202 of the Act (*infra*, p. 34) provided—

> That the enlisted man may allot any proportion or proportions or any fixed amount or amounts of his monthly pay or of the proportion thereof remaining after the compulsory allotment, for such purposes and for the benefit of such person or persons as he may direct, subject, however, to such conditions and limitations as may be prescribed under regulations to be made by the Secretary of War and the Secretary of the Navy, respectively.

And in Section 203 (*infra*, p. 35) it was provided—

> That in case one-half of an enlisted man's monthly pay is not allotted, regulations to be made by the Secretary of War and the Sec-

> retary of the Navy, respectively, may require, under such circumstances and conditions as may be prescribed in such regulations, that any proportion of such one-half pay as is not allotted shall be deposited to his credit, to be held during such period of his service as may be prescribed.

In the second place, the pay of an enlisted man is dependent upon and incidental to his contract of enlistment, and, as was well said by the court below (R. 51–52):

> The policy of the government, as indicated by the legislation bearing upon the subject of enlistment, reenlistment and extension of enlistment, is to limit the period of service of the sailor to a fixed period [1] at the expiration of which the contract of enlistment expires. In order to induce him to reenlist and to continue in the service of the government with the accruing benefit to the government of his service training certain inducements are held out to him, such as increased pay, increased rating and retirement pay.

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[1] See R. S. 1418 (U.S.C., Title 34, Sec. 181) and statutes cited in footnote 4, pp. 23–25, *infra*; Act of June 3, 1916, c. 134, Sec. 27, 39 Stat. 166, 185 (U.S.C., Title 10, Sec. 628).

Enlistments in the Navy may be extended for a definite period pursuant to voluntary agreement by the enlisted man. Act of August 22, 1912, c. 335, 37 Stat. 328 (U.S.C., Title 34, Sec. 184).

During the World War men were drafted or permitted to enlist for the period of the emergency. Act of May 18, 1917, c. 15, 40 Stat. 76; Act of May 22, 1917, c. 20, Sec. 3, 40 Stat. 84, 85.

(The above statutes are those which were in effect at the dates of the reenlistments of the insured in this case. The United States Code citations give the later statutes.)

> These inducements offered by the government, however, do not in any manner affect the fact that the original or subsequent enlistments are separate contracts. Each reenlistment is an absolutely new contract between the Government and the sailor. The obligations assumed by the government in the event of reenlistment are different from those resulting from the earlier enlistments. These obligations are fixed by statute and by the regulations of the department and by reason thereof the sailor, who serves continuously by reenlistment or by an extension of an existing enlistment, receives an additional consideration for the more valuable service thus rendered the government during the subsequent enlistment.
>
> The discharge, however, under any enlistment absolutely terminates any contractual relation between the government and the sailor and the new relations assumed by each in connection with the reenlistment are entirely separate and distinct from the relations theretofore existing except as they are altered by statute or regulation applicable to the new status arising from the reenlistment.

See also *United States* v. *Union Pac. R.R. Co.*, 249 U.S. 354, 358; *In re Grimley*, 137 U.S. 147, 151, 152; *United States* v. *Landers*, 92 U.S. 77, 79.

The court might also have added that the severance of the contractual relation between the Gov-

ernment and the enlisted man which results from a discharge at the end of the period of enlistment is manifested by a complete settlement of the man's pay account (see R. 30).

If the court's analysis of the contract of enlistment is correct, and we do not see how it can be disputed, it obviously demonstrates the fallacy of petitioner's argument. If the contract of enlistment runs only for a definite period of time, any agreement which relates to an incident of that enlistment can certainly have no longer life. As the pay of an enlisted man is an incident of his contract of enlistment, it is evident that an authorization for an assignment of a portion of that pay for a particular purpose can have no longer duration than the contract out of which the pay arises.

In recognition of this principle, we find that it has been the uniform practice of the Navy Department, both before and after the issuance of Bulletin No. 1 by the Director of War Risk Insurance, to limit the duration of an allotment or assignment of an enlisted man's pay to the enlistment in which the allotment or assignment was made. Thus, in paragraph 4472 (5) of Navy Regulations, 1913, p. 330–R (Regulations for the Government of the United States Navy, Reprinted, 1917), it was provided:

> The death, discharge, resignation, or desertion of a person who has an allotment

> running, shall be cause for stopping the same, * * *.[2]

In Paragraph 729, Section 46, Manual for Supply Officers Afloat, United States Navy, 1917, it was provided with reference to allotments (p. 275):

> The death, discharge, resignation, or desertion shall be cause for stopping the same.

In Volume 7, Bureau Memoranda, Supply Corps, U.S. Navy, covering the period from February 1, 1916, to December 31, 1917, there is printed at p. 4392, an ALNAV dispatch from the Secretary of the Navy, dated November 19, 1917, reading in part as follows:

> Compulsory allotments and premiums for insurance taken out by enlisted men under Soldiers and Sailors Insurance Law will be checked against enlisted men's accounts on the first day of each month * * * In case of discharge, death, desertion, stoppage or changes of allotments for other reasons, inform Navy Disbursing Officer or Paymaster Marine Corps by telegrams.

See also War Risk Insurance Circulars One and Three, issued by Bureau of Supplies and Accounts of the Navy Department, which are copied at pp. 18–19, *infra*.

It is evident, therefore, that a paymaster of the Navy was without authority under the Regulations

[2] A similar provision is found in Paragraph 1350, Army Regulations, 1917, which reads: "On the death, discharge, or desertion of a soldier who has an allotment running, the allotment ceases."

deduct insurance premiums from the pay of an
listed man or from his deposits after the expira-
on of an enlistment where the man reenlisted
thout renewal of the authorization. At the time
the second enlistment of the insured in this case
March 18, 1918, the War was still raging and
tle thought had apparently been given as yet to
e devising of a simple and expeditious method
r the renewal of authorizations for the deduction
premiums, as we do not find any Regulations
aling specifically with the subject. There was,
wever, then in effect a well established system
lating to allotments of pay by an enlisted man
the Navy (Navy Regulations, 1913, Pars. 4471–
79), and it is only reasonable to suppose that an
listed man entering upon a second enlistment was
oroughly cognizant of this system. Under this
stem any man desiring to continue his insurance
uld undoubtedly have done so by executing an
otment. However, during the period of the in-
red's second enlistment beginning March 18,
18, and terminating September 15, 1919, hostili-
s had ended, and the authorities realized that a
rge number of policies would be lapsed unless
finite regulations were issued calling the atten-
on of those who were leaving the service to the
sirability of retaining their insurance and giving
ecific instructions as to how this might be accom-
ished. It was only natural that at the same time
e authorities should have given thought to the

problem of the man who reenlisted, and they were confronted with the question whether, if a man in this category wished to retain his insurance and desired the premiums to be deducted from his pay, he should be required to execute a formal allotment of his pay in accordance with the system provided by the Navy Regulations, or whether some simpler method should be devised. The problem was solved by devising a simple and easily comprehended method for the renewal of his authorization by the man who reenlisted. By War Risk Insurance Circular Number One, issued by the Bureau of Supplies and Accounts of the Navy Department on November 15, 1918 (*infra,* pp. 44–45), it was specifically provided in Section 11 that—

> On discharge every man, having an insurance application, shall be furnished with a certified copy thereof and S. & A. Form 374, properly filled out, in duplicate. He shall be instructed to forward both copies of S. & A. Form 374 to the Bureau of War Risk Insurance with the first remittance of premium by him. *He shall be further instructed that, in case of reenlistment, he shall give the certified copy of the insurance application to the officer of the Pay Corps taking up his pay account.* (Italics ours.)

On January 13, 1919, this Regulation was amended in several minor respects by another Regulation issued by the Bureau of Supplies and Accounts, known as War Risk Insurance Circular Number Three (*infra,* p. 47). As amended the Regulation read:

On discharge every man having an insurance application shall be furnished with a certified copy thereof and Treasury Bureau of War Risk Insurance, Form 2303, "Information relative to Compensation and Continuance of War Risk Insurance", properly filled out in duplicate. He shall be instructed to forward both copies of Treasury Bureau of War Risk Insurance, Form 2303, to the Bureau of War Risk Insurance with the first remittance of premium by him. *He shall be further instructed that in case of reenlistment he shall give a certified copy of insurance application to the Officer of the Pay Corps taking up his pay account.* The Officer of the Pay Corps shall check the monthly premium and notify the Disbursing Division, Supplies and Accounts, stating the date of first checkage by him. (Italics ours.)[3]

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[3] See also to the same effect undated circular letter appearing in Vol. 8, Bureau Memoranda, Supply Corps, U.S. Navy, p. 4552, covering period from January 1, 1918, to December 31, 1919 (*infra*, p. 40).

Under Special Regulations No. 72 of the War Department, par. e (3), p. 11, issued March 31, 1919, it would appear that when a man who reenlisted in the Army desired to renew his authorization for the deduction of premiums from his pay or deposit, he was required to give to the commander of the company or detachment to which he was assigned certain detailed information about his insurance. *O'Neill* v. *United States*, 32 F. (2d) 313 (Mass.), indicates that by later regulations the soldier was required to fill out a form in which he expressed the desire to renew his authorization for the deduction of premiums from pay or deposit.

This requirement that an authorization for the deduction of premiums from pay or deposit should be renewed upon reenlistment by the presentation of a certified copy of the application for insurance to the pay officer taking up the insured's pay account was not a senseless requirement. It is true, of course, that the Government had copies of the insurance application in its files (see War Risk Circular Number One, Bureau of Supplies and Accounts (*infra*, p. 43)), but a man may have reenlisted at a point hundreds of miles from that at which he was discharged, with the result that different paymasters would be involved. If some such simple expeditious system had not been devised interminable confusion and delay would undoubtedly have ensued and many policies would probably have lapsed for nonpayment of the first premium due after reenlistment.

In the instant case the record does not disclose whether the insured was advised by the discharging officer at the time of his discharge from his second enlistment on September 15, 1919, that in the event of reenlistment he should give a certified copy of the insurance application to the officer taking up his account in order to renew his authorization for the deduction of premiums from pay or deposit. But, as the court below said, and as was also said in *United States* v. *Barry*, 67 F. (2d) 763, 764 (C.C.A. 6th), now pending in this Court on petition for certiorari No. 808, it must be assumed, in the absence

of evidence to the contrary, that an officer properly discharges his official duties. *United States* v. *Chemical Foundation*, 272 U.S. 1, 14–15. It must consequently be assumed that the insured in this case was advised that he could only renew his authorization by depositing a certified copy of his insurance application with the pay officer taking up his pay account upon reenlistment, and while the findings and stipulation of facts in this case are ineptly expressed in stating that the insured did not upon reenlistment execute any papers for the purpose of renewing his previous authorization for the deduction of premiums from pay or deposit (R. 25, 30), it may logically be inferred from them that the insured took no steps to renew his authorization. In any event, the burden was upon the petitioner to show that the insured had either paid his premiums subsequent to his first enlistment or else had validly renewed the authorization for deduction of premiums from pay or deposit which he had given at the time he applied for the insurance. As the District Court found that he had not paid the premiums during the subsequent enlistments, and as it was neither stipulated by the parties nor found by the court that there was a valid renewal of the authorization for the deduction of premiums, it is evident that the petitioner cannot prevail, unless, as he contends, the situation was in some way changed because the insured was a continuous service man.

It will be observed that there is nothing in the Regulations to which reference has been made placing a man holding a continuous service certificate who reenlists, in any different position with respect to the renewal of his authorization for the deduction of premiums than any other person reenlisting who does not hold such a certificate, and the reason is evident when we examine the statutes and regulations relating to continuous service which were in effect when the insured reenlisted each time.

The Naval Service Appropriations Act of August 22, 1912, c. 335, 37 Stat. 328, 331, provided—

> That section fifteen hundred and seventy-three of the Revised Statutes of the United States as amended by section sixteen of an Act entitled "An Act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States," approved March third, eighteen hundred and ninety-nine, be, and the same is hereby, amended to read as follows: "If any enlisted man or apprentice, being honorably discharged, shall reenlist for four years within four months thereafter, he shall, on presenting his honorable discharge or on accounting in a satisfactory manner for its loss, be entitled to a gratuity of four months' pay equal in amount to that which he would have received if he had been employed in actual service:[1] *Provided,* That any enlisted

[1] This amount was changed by later legislation, which, however, was not in effect at the dates of the insured's two reenlistments. See Act of June 10, 1922, c. 212, 42 Stat. 625, 630 (U.S.C., Title 37, Sec. 16).

man in the Navy whose term of enlistment has been extended for an aggregate of four years shall, after the expiration of the preceding four-year term of enlistment upon which the extension is made and if otherwise entitled to an honorable discharge, be paid the gratuity above provided: *And provided,* That any man who has received an honorable discharge from his last term of enlistment, or who has received a recommendation for reenlistment upon the expiration of his last term of enlistment, who reenlists for a term of four years within four months from the date of his discharge, shall receive an increase of one dollar and thirty-six cents per month to the pay prescribed for the rating in which he serves for each successive reenlistment: *And provided further,* That an extension of the period of enlistment as hereinbefore authorized, aggregating four years, shall be held and considered as equivalent to continuous service with respect to all rights, privileges, and benefits granted for such service pursuant to law."[5]

[5] By Section 3 of the Act of May 22, 1917, c. 20, 40 Stat. 84, 85, it was provided that "enlistments in the Navy and Marine Corps, during such time as the United States may be at war, shall be for four years or for such shorter period or periods as the President may prescribe, or for the period of the present war."

The Act of July 11, 1919, c. 9, 41 Stat. 131, provided at page 134 that—

Until June 30, 1920, enlistments in the Navy may be for terms of two, three or four years, and all laws now appli-

Paragraph 3529 (1) of Navy Regulations, 1913, provided that—

> Any man who, having been honorably discharged, or discharged with a recommendation for reenlistment, shall within four months thereafter reenlist for four years shall receive in exchange for his discharge a continuous-service certificate * * *.

And in paragraph 4427 (22) of Navy Regulations, 1913, it was provided that—

> If any enlisted man or apprentice, being honorably discharged, shall reenlist for four years within four months thereafter, he shall, on presenting his honorable discharge or on accounting in a satisfactory manner for its loss, be entitled to a gratuity of four months' pay equal in amount to that which he would have received if he had been employed in actual service * * *.

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cable to four-year enlistments shall apply, under such regulations as may be prescribed by the Secretary of the Navy, to enlistments for a shorter period with proportionate benefits upon discharge and reenlistment.

And at page 139—

Any enlisted man of the Navy, Marine Corps, or Coast Guard, who, since February 3, 1917, and before November 11, 1918, enlisted for the period of four years shall upon his application made to the Secretary of the Navy on or before September 1, 1919, be held and construed to have enlisted for the duration of the war and shall when discharged be granted an honorable discharge, and upon the taking effect of this Act shall be notified by the Secretary of the Navy of his right to file such application: *Provided*, That said enlisted man is otherwise entitled to an honorable discharge: *Provided further*, That the return home of the American

It is apparent from this survey of the statutes and regulations that the only significance that "continuous service" has is that a bounty and increased pay is given by the Government to encourage the early return to the service of the experienced sailor. "Continuous service" does not bridge the hiatus in service which results from the discharge and the reenlistment. Whether a man is a continuous service man or not, each enlistment is, under the principle heretofore stated (*supra*, pp. 13–15), a new and separate contract. There can therefore be no logical reason why a man without continuous service who reenlists should be required to renew his authorization for the deduction of premiums from pay or deposit while the continuous-service man who reenlists is free from this requirement. Moreover, under the Regulations a man may wait four months after the expiration of his previous enlistment before reenlisting and still be entitled to a continuous-service certificate. The grace period for the payment of his premiums will have expired and the reenlistment may have taken place hundreds of miles from the place of discharge

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Expeditionary Forces shall not be thereby delayed: *Provided further*, That any enlisted man who takes advantage of the provisions of this paragraph to secure a discharge from the Navy, Marine Corps, or Coast Guard, and thereafter reenlists within four months in the Navy or in the Marine Corps, under conditions as now prescribed by law, for a period of four years, shall be entitled to receive the benefits of the gratuity pay provided by existing law for reenlistments.

from his preceding enlistment. Different paymasters may thus be involved. Can it be that this man stands on a different plane than the one who, as in the instant case, reenlists the next day, although both are continuous-service men? We think not.

Considering the regulations as a whole,[6] we submit that there was an administrative construction as to the duration of authorizations for deduction of premiums from pay or deposit which is wholly at variance with the view taken by the petitioner in this case. If the interpretation sought by petitioner should be applied, there would be no apparent limitation upon the duration of an authorization for deduction of premiums from pay or deposit heretofore administratively confined to the enlistment in which it was executed, and no apparent reason to deny the continuance of insurance protection (without knowledge of insurer or insured) in all cases of continued service in any other branches of the Government, civil, military, or naval. The insurer would be faced with a tremendous potential liability clearly not contemplated by the contract or the statute. Such a construction of the regulations upon which petitioner relies should, of course, be avoided.

Moreover, the action of the insured in accepting the full amount of his pay without deduction

[6] Regulations referred to by the petitioner in her brief but not considered herein are either of similar import to those discussed herein or else were not in effect at the dates of the insured's two reenlistments.

for premiums during two enlistments subsequent to that in which the authorization was given, a period of over three years, is, we submit, persuasive evidence of an acquiescence by the insured himself in the contemporaneous administrative construction of the duration of the authorization. It is difficult to believe that the insured, an experienced sailor, did not know during all this three-year period that the premiums were not being deducted from his pay. It is not an unreasonable assumption that, as was said by the court below, the insured "must have known" that the premiums were not being checked against his pay account (R. 57).

With reference to a quite similar situation, the Circuit Court of Appeals for the Sixth Circuit made the following comment in *United States* v. *Barry*, 67 F. (2d) 763, 765:

> Moreover, the record clearly requires the conclusion that Barry's default was his deliberate and voluntary act or omission. Barry knew his insurance was not in force after October 1st. In addition to the notice given to him upon discharge he received his full pay during his final enlistment period. It is inconceivable that a soldier of his experience would not know precisely the amount of pay coming, even though from month to month it varied. He had been in the army since 1908, had been a second and a first lieutenant, and was sergeant major during his final term. Subsequent efforts to

> have his insurance reinstated lends, in our opinion, additional support to this conclusion. Insofar as they are urged in support of an inference that Barry did not know that his insurance premiums were not being paid, it is only necessary to say that when proven facts support equally two inconsistent inferences, there is no substantial evidence to support either, and judgment must go against the party having the burden. *Pennsylvania R. Co.* v. *Chamberlain,* 288 U.S. 333, 339, 53 S.Ct. 391, 77 L.Ed. 819.

See also *Crawford* v. *United States,* 291 Fed. 801, 805–806 (N.D.Ohio).

While there have been several cases presenting questions closely related to that under consideration in this case, it is significant that no insured has himself ever contended that an authorization for deduction of premiums from service pay extended beyond the enlistment in which it was executed. There is no record of any war-risk insurance case ever having been filed during the lifetime of the insured, in which the theory has been advanced that insurance protection continues during an enlistment in which premiums were not deducted, because of an authorization for deduction of premiums executed during a prior enlistment.

The decision of the Circuit Court of Appeals in the instant case is supported by the decision of the Circuit Court of Appeals for the Sixth Circuit in *United States* v. *Barry,* 67 F. (2d) 763, and by that of the Circuit Court of Appeals for the Second

Circuit in *Sawyer* v. *United States,* 10 F. (2d) 416, but is contrary to the decision of the Circuit Court of Appeals for the Tenth Circuit in *Unger* v. *United States,* 65 F. (2d) 946. See also *O'Neill* v. *United States,* 32 F. (2d) 313 (D.C.Mass.); and *Mortek* v. *United States,* 297 Fed. 485 (E.D.Ill.).

The decisions in the instant case, the *Barry* case, and the *Sawyer* case, are predicated upon the expiration of the authorization for deduction of premiums with the expiration of the contract of enlistment to which it is incident, and in the instant case and the *Barry* case, upon the additional ground that the long continued receipt of pay without premium deductions constituted a voluntary abandonment of insurance.

In the *Unger* case, *supra,* it was held that an authorization for deduction of premiums from service pay executed during one enlistment remained in effect during a second enlistment and that as the soldier was entitled to continuous-service pay from which deductions could have been made for insurance premiums they should have been treated as paid although such deductions were not in fact made. The opinion makes no reference to the Army Regulation that "On the death, discharge, or desertion of a soldier who has an allotment running, the allotment ceases" (paragraph 1350, Army Regulations, 1917).[7]

[7] The Government did not apply for certiorari in the *Unger* case, for the reason among others, that as the case was remanded for a new trial without the court passing upon

The case of *United States* v. *LePage*, 59 F. (2d) 165 (C.C.A. 1st), relied upon in petitioner's brief, is not in point. The question there decided related to an application for war-risk insurance made on behalf of the soldier by a third party on the last day of the statutory period within which applications might be received. The application was ratified by the soldier after the expiration of the statutory period, and the opinion was concerned primarily with the question whether the application was timely executed. The case did not present the question whether an authorization for deduction of premiums from service pay executed during one enlistment is effective during a subsequent enlistment.

In the case of *O'Neill* v. *United States, supra*, a District Court decision, there were three periods of service, in the first two of which the premiums were deducted from service pay. There was no renewal of the authorization for the deduction of premiums during the third enlistment of the insured, who died shortly after the beginning of this enlistment. Although the court stated in the early part of its opinion that (pp. 313–314)—

> It was in evidence that the Bureau of War Risk Insurance had adopted form 758, revised to February 1920, which was to be used after reenlistment into active service,

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the sufficiency of the evidence to support the judgment, the question decided might not arise upon a second trial in view of an allegation in the complaint that the insured was permanently and totally incapacitated prior to his first discharge.

> and only for the purpose of renewing previous authorization of deduction from pay for yearly renewable term insurance. This form calls for the signature of the soldier, and in it he expresses a desire that the insurance be continued for a specified amount, and renews his authorization to deduct. * * *

and although this regulation was in effect at the time of the insured's third enlistment, the court held (p. 314) that there was "no statute or regulation requiring the insured to renew the authority which, in his application, he had conferred upon the government to deduct the premium from his pay." The court also held that while the insured during his third enlistment (p. 313)—

> signed the pay roll each month, * * * the amounts received varied, and unless he made a careful examination of the pay roll he would have had no reason to believe that the deductions were not being made as theretofore. I do not find that he had actual knowledge that the premiums were not being deducted.

In the *Mortek* case, *supra,* also a District Court decision, a second enlistment was not involved, and the question presented was whether, pursuant to an authorization for the deduction of premiums from pay, uncollected pay due a soldier at the date the Government contended he was discharged from the service could be applied to the payment of a pre-

mium which would have kept the insurance in effect until his death several months after the discharge. If the opinion is susceptible of the construction that it held that an authorization for deduction of premiums from pay or deposit continues effective after the expiration of the contract of enlistment in the course of which it was executed, and to which it is incident, it may be pointed out that several months after it rendered its opinion the court, upon rehearing, found as a fact that the insured remained in the service under a single enlistment to the date of his death, and entered judgment accordingly. (A copy of the journal entry of judgment in the *Mortek* case appears in the Appendix, *infra*, p. 48.)

CONCLUSION

It is respectfully submitted that the duration of an authorization for the deduction of war-risk insurance premiums from Navy pay was subject to the Regulations of the Navy Department; that under such Regulations the authorization ceased to be effective with the expiration of the contract of enlistment in the course of which it was executed and to which it was incident; that the Regulations of the Bureau of War Risk Insurance upon which petitioner relies were never intended to continue insurance in force during enlistments subsequent to the enlistment in which the deduction of insurance premiums from pay was authorized, and that such construction of the Regulations of the Bureau

of War Risk Insurance would render them of doubtful validity and therefore should be avoided. For the reasons stated it is respectfully submitted that the judgment below should be affirmed.

J. CRAWFORD BIGGS,
Solicitor General.
WILLIAM STANLEY,
The Assistant to the Attorney General.
WILL G. BEARDSLEE,
Director, Bureau of War Risk Litigation.
WILBUR C. PICKETT,
Special Assistant to the Attorney General.
W. MARVIN SMITH,
Attorney.

MAY 1934.

APPENDIX

STATUTES AND REGULATIONS

Pertinent Provisions of the War Risk Insurance Act, as amended October 6, 1917:

Section 13 (40 Stat. 399):

That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, and shall decide all questions arising under the Act, except as otherwise provided in sections five and four hundred and five. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context otherwise requires, shall or may be made by the director, subject to the general direction of the Secretary of the Treasury. * * *

Section 202 (40 Stat. 403):

That the enlisted man may allot any proportion or proportions or any fixed amount or amounts of his monthly pay or of the proportion thereof remaining after the compulsory allotment, for such purposes and for the benefit of such person or persons as he may direct, subject, however, to such conditions and limitations as may be prescribed under regulations to be made by the Secretary of War and the Secretary of the Navy, respectively.

Section 203 (40 Stat. 403):

That in case one-half of an enlisted man's monthly pay is not allotted, regulations to be made by the Secretary of War and the Secretary of the Navy, respectively, may require, under such circumstances and conditions as may be prescribed in such regulations, that any proportion of such one-half pay as is not allotted shall be deposited to his credit, to be held during such period of his service as may be prescribed.

Section 402 (40 Stat. 409):

That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance.

* * * * *

Section 404 (40 Stat. 410):

That during the period of war and thereafter until converted the insurance shall be term insurance for successive terms of one year each. Not later than five years after the date of the termination of the war as declared by proclamation of the President of the United States, the term insurance shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty-payment life, endowment maturing at age sixty-two and into other usual forms of insurance and shall prescribe the time and method of payment of the premiums thereon, but payments of premiums in advance shall not be required for periods of more than one month each and may be deducted from the pay or deposit of the insured or be otherwise made at his election.

REGULATIONS

Bulletin No. 1, issued by the Director of War Risk Insurance on October 15, 1917 (Regulations and Procedure United States Veterans' Bureau, Part. II, pp. 1235, 1237), provides in part as follows:

> 3. That the insurance has been granted will be evidenced by a policy or policies issued by the bureau, which shall be in the following general form (which form may be changed by the bureau from time to time, provided that full and exact terms and conditions thereof shall not be altered thereby):
>
> Under the authority granted by Congress in an act amending "An act entitled 'An act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department', approved September 2, 1914, and for other purposes", approved October 6, 1917, and subject in all respects to the provisions of such act, of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with this policy, the application therefor, and the terms and conditions published under authority of the act, shall constitute the contract:
>
> Hereby insures from and after the ------ ---------- day of ---------- 19--, John Doe, of Illinois, private, Company A, Third Infantry, conditioned upon the payment of premiums as herein provided. * * *
>
> Premiums shall be paid monthly on or before the last day of each calendar month and will, unless the insured otherwise elects in writing, be deducted from any pay due him/her from the United States or deposit by him/her with the United States, and, if

so to be deducted a premium when due will be treated as paid, whether or not such deduction is in fact made, if upon the due date the United States owe him/her on account of pay or deposit an amount sufficient to provide the premium, provided that the premium may be paid within 31 days after the expiration of the month, during which period of grace the insurance shall remain in full force. If any premium be not paid, either in cash or by deduction as herein provided, when due or within the days of grace, this insurance shall immediately terminate, but may be reinstated within six months upon compliance with the terms and conditions specified in the regulations of the bureau.

* * * * *

4. * * * In case the applicant does not desire the premium to be deducted from his/her pay (or his/her deposit) he/she should so elect in writing at the time of making application; but if no election is made it shall have the effect to provide for such deduction from his/her pay, or if such pay be insufficient, any balance from his/her deposit.

Navy Regulations (1913), Paragraph 4472 (5):

The death, discharge, resignation, or desertion of a person who has an allotment running, shall be cause for stopping the same, and the supply officer of the ship to which the person was attached shall notify the Navy disbursing officer by the first opportunity, stating the amount checked by himself, and the last month for which checked, except in the case of marines transferred to a shore station within the continental limits of the United States, when the supply officer of the

ship will transfer the allotment to the marine paymaster of that station for stoppage by the latter. The supply officer will be held liable for amounts paid by the Navy allotment officer in the absence of due notice. But this shall not relieve the Navy allotment officer from responsibility for losses resulting from overpayments due to want of diligence on his part, either in the making of immediate acknowledgment of supply officers' notices or from lack of cooperation in effecting the proper checkages against grantor's account. When an allotment is stopped the supply officer shall charge the allotment for as many months in advance as will probably be required for information to reach the Navy allotment officer. Forfeiture of pay by sentence of a general or summary court-martial or deck court shall also be cause for stopping an allotment when the payment of such allotment, in addition to the forfeiture, would place the grantor in debt to the Government. The allotment in such case may be renewed immediately sufficient pay has become due him to cover the amount of the first payment. (Regulations for the Government of the Navy of the United States, 1913.)

Section 46, Manual for Supply Officers Afloat, United States Navy, 1917, (Paragraph No. 729):

Causes and method of stoppage.—"The death, discharge, resignation, or desertion shall be cause for stopping the same" (N.R. 4472–5).

* * * * *

ALNAV despatch sent by the Secretary of the Navy, November 19, 1917:

Paragraph 2 (b) of Article 4893 Naval Instructions is hereby canceled. Compulsory allotments and premiums for insurance taken out by enlisted men under Soldiers and Sailors Insurance Law will be checked against enlisted men's accounts on the first day of each month. After these checkages have been made, all remaining pay is subject to checkage for loss of pay by sentence for general, summary or deck courts, or checkage for Government property loss. If, however, the sentence of a general court involves prison confinement, all pay being forfeited as a result of such sentence, allotments and insurance are also forfeited and will not be deducted. After checkages for compulsory allotments, premiums on insurance and loss of pay due to general, summary or deck courts as aforesaid have been made, remainder of pay is subject to checkage for voluntary allotments. When pay is stopped by reason of absence from duty without authority or due to misconduct, allotments and premiums on insurance will be stopped for the period during which pay is so lost, unless enough pay shall accrue during the current month notwithstanding misconduct checkages to cover such allotments or premiums. New War Risk Navigation and Marine Corps forms will be forwarded to Bureau of Navigation or Major General Commandant in case of Marines whenever any change occurs. In case of discharge, death, desertion, stoppage or changes of allotments for other reasons, inform Navy Disbursing Officer or Paymaster Marine Corps by telegram. (Volume 7, Bureau Memoranda, Supply Corps, U.S. Navy, p. 4392, covering period from Feb. 1, 1916, to Dec. 31, 1917.)

War-risk allotments and insurance: Circular letter (not dated) regarding stop notices therefor and certified copies thereof:

* * * * *

4. When a person is discharged from the Service he should be notified as to his option of continuing insurance, the amount of the premium, and the fact that all remittances should be made payable to the Treasurer of the United States and forwarded to the Bureau of War Risk Insurance together with full name, former ship or station, rating and period which premium covers. A man leaving the service should be furnished a certified copy of his Insurance application and instructed that in the event of reenlistment in any branch of the service he should present the same to the Pay Officer taking up his account who should thereafter check premium against his pay. (Volume 8, Bureau Memoranda, Supply Corps, U.S. Navy, p. 4552, covering period from Jan. 1. 1918, to December 31, 1919.)

War-Risk Insurance Circular Number One

141–15–Adm

Navy Department,
Bureau of Supplies and Accounts,
Washington, D.C., November 15, 1918.

To: Commandants, Commanding Officers, and Officers of the Pay Corps.

The following instructions are issued for the guidance of all concerned in the matter of War Risk Insurance and Family Allotments. They combine all instructions, completely revised to date, which have been issued. In the future all instructions regarding War Risk Insurance and Family Allotments will be issued from the Allotment Division, Bureau of Supplies and Accounts.

McGowan.

* * * * *

INSURANCE

1. Every commissioned officer and enlisted man and every member of the Navy Nurse Corps (female), when employed in active service under the Navy Department, shall be given an opportunity to apply for government insurance in any amount from $1,000 to $10,000 in multiples of $500.00, within one hundred twenty (120) days from date of enlistment, or date of reporting for active service. Application shall be made on Treasury Form 2A and if possible, should be prepared on the typewriter. In case of enlisted personnel, the application shall be witnessed by an officer.

2. The beneficiary named in an insurance application must bear the relationship to the insured of spouse, parent, or grandparent (of either insured or the spouse of insured), grandchild, brother, or sister, as defined by the War Risk Insurance Act. A change of beneficiary may be made at any time within the permitted class and without the consent of the beneficiary previously named in the application of the insured. Application for change of beneficiary will be made on Treasury Department Form 724, witnessed by an officer, which shall be forwarded in triplicate to the Navy Allotment Officer.

3. The responsibility for the proper execution of applications for government insurance rests upon Commanding Officers and Commandants. Every application for insurance shall be executed in quadruplicate and forwarded immediately by the applicant's Commanding Officer to the Officer of the Pay Corps on whose rolls the applicant's pay account is carried.

4. Every application shall be inspected as to its completeness by the officer carrying the applicant's pay account. If found improperly executed, the officer carrying the accounts will return the application to the applicant's Commanding Officer, pointing out in what respects the application is incomplete or incorrect. The responsibility for the proper checkage of insurance premiums rests on the officer of the Pay Corps carrying the account against which the premium is to be charged.

5. Every application for insurance which is correct, shall be recorded at once by the officer carrying the account of the applicant. A description of

the insurance shall be entered on the pay roll and a record kept similar to that kept for Navy voluntary allotments (S. & A. Form 6). The following indorsement will be placed on the back of every recorded application for insurance:

_____, 19___.
(Day) (Month)

Recorded by me this date. Checkage of premium ($_____) will be made by me monthly from date of application.

First checkage made _____, 19___, for
(Day) (Month)
$_____.

_____

_____ Pay Corps, U.S.N.

6. After an application has been recorded, the original and first copy shall be forwarded immediately to the Navy Allotment Officer, Washington, D.C. The Navy Allotment Officer will file a copy of the application and forward the original to the bureau of War Risk Insurance. The remaining two copies will be retained by the officer of the Pay Corps who registers the application—one copy for his permanent files and the other to be forwarded with the transfer pay account of the applicant.

7. Letters transmitting applications for insurance shall indicate the number of applications inclosed therewith as is the practice in forwarding applications for Navy voluntary allotments (S. & A. Form 6). Correspondence from all persons in the naval service, regarding government insurance, shall be forwarded to the Navy Allotment Officer.

8. In no case will Insurance premiums be prorated. The premium charged for insurance shall be entered on the debit side of the pay roll in the column headed, "War Risk Insurance Premiums." Checkage of one month's premium shall be made

on the day the application is executed and, thereafter, one month's premium shall be checked on the first day of every month. Checkage must be made on the Navy pay roll of premium for every application for insurance executed by officers or men of the NAVY. Checkage of insurance premium will continue while a man is in a pay status, or until the insurance is cancelled by written request over the man's signature, forwarded through the officer of the Pay Corps carrying his account. The cancellation of insurance at the request of this insured will become effective on the first day of the month following that in which request is made.

9. The insurance is issued at monthly rates for the age (nearest birthday) of insured when insurance becomes effective. On July 1, 1919, all premiums on insurance, which has been in force for twelve months, will be increased to the amount of premium for the next age above that shown on the application. Thereafter on 1 July of each year, all premiums for insurance, which has been in force for twelve months, or more, will be increased to the amount of premium for the next succeeding age of the applicant.

10. All transfer pay accounts shall contain full information regarding insurance carried by the man transferred, including a statement as to the last month charged. A copy of every application for insurance, certified true and correct by an officer of the Pay Corps, will accompany every transfer pay account.

11. On discharge every man, having an insurance application, shall be furnished with a certified copy thereof and S. & A. Form 374, properly filled out,

in duplicate. He shall be instructed to forward both copies of S. & A. Form 374 to the Bureau of War Risk Insurance with the first remittance of premium by him. He shall be further instructed that, in case of reenlistment, he shall give the certified copy of the insurance application to the officer of the Pay Corps taking up his pay account.

12. At the end of each quarter, and on detachment, all officers of the Pay Corps, carrying pay accounts, will submit with their quarterly returns, an abstract of checkages on revised S. & A. Forms 375 and 375a. In Column 6 of this form, will be entered, opposite each man's name, the total amount of insurance premium charged for the current quarter. All checkages, or reports, of premiums for periods prior to the current quarter, will be entered in Columns 8 or 9, indicating in Column 10, insurance by "I" and noting the month for which the charge is made. The abstract should contain the names in full of all men concerned, listed in sequence of pay number. Separate abstracts will be rendered for each roll. All errors found in the abstracts which have been forwarded to the Navy Allotment Officer, will be corrected in the Correction Column of the next abstract submitted, but never by separate letter. Where it is not possible to make such corrections on a subsequent abstract, by reason of the account having been transferred from the roll, request for correction of error will be made in the usual way, namely, by requesting credit or checkage, on the officer to whom the account has been transferred.

13. On all applications, abstracts or correspondence concerning War Risk Insurance, the given names, as well as surnames of both the appli-

cant and the beneficiaries should be spelled out in full. In no case should initials alone of given names be used.

14. The checkage of insurance premiums will take precedence over government indebtedness due to property loss, and loss of pay by sentence of deck court, summary court-martial, or general court martial not involving prison confinement. Sentence of general court-martial involving prison confinement will operate to stop checkage of insurance premiums on the Navy pay roll. In such cases, the man should be instructed to remit, or have someone else remit, the premium directly to the Bureau of War Risk Insurance, or suffer his insurance to lapse. Government insurance may be cancelled for the reasons specified in Section 29 of the War Risk Insurance Act as amended 25 June 1918, or upon the request of the insured over his signature. In all cases where checkage of insurance premium is discontinued, notice thereof should be sent immediately to the Navy Allotment Officer on S. & A. Form 373.

15. In the case of absence without leave Insurance premium will be checked from subsequent pay. If the absence develops into desertion, checkage will be stopped with the premium for that month, provided there is sufficient money due; if not, checkage will be stopped with the preceding month. If a man is not in a pay status by reasons of the operation of G.O. 231 (misconduct) Insurance premiums may be checked from money due, or from subsequent pay, provided a period of sixty (60) days has not elapsed during which no premium was checked, in which case the man must apply for reinstatement.

War Risk Insurance Circular Number Three

151–15–Adm

Navy Department,
Bureau of Supplies and Accounts,
Washington, D.C., 13 January, 1919.

To: Commandants, Commanding Officers, and Officers of the Pay Corps.

1. Insurance Paragraph 11 of War Risk Insurance Circular Number One is hereby amended to read as follows:

> On discharge every man having an insurance application shall be furnished with a certified copy thereof and Treasury Bureau of War Risk Insurance, Form 2303, "Information Relative to Compensation and Continuance of War Risk Insurance", properly filled out in duplicate. He shall be instructed to forward both copies of Treasury Bureau of War Risk Insurance, Form 2303, to the Bureau of War Risk Insurance with the first remittance of premium by him. He shall be further instructed that in case of reenlistment he shall give a certified copy of insurance application to the Officer of the Pay Corps taking up his pay account. The Officer of the Pay Corps shall check the monthly premium and notify the Disbursing Division, Supplies and Accounts, stating the date of first checkage by him.

McGowan.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ILLINOIS

Rosa Mortek, plaintiff, v. *United States, defendant*

No. 1815

JOURNAL ENTRY

This cause coming on to be heard this 7th day of July 1924, upon motion of the defendant, the United States of America, for a rehearing was argued by counsel and submitted to the Court, and the Court, being fully advised in the premises, finds said motion well taken and grants the same.

And thereupon said cause being further argued by counsel, and the Court being fully advised in the premises, finds that at the time of the death of the said John Frank Musial, to-wit, April 17, 1919, the said John Frank Musial had not been discharged from active military service of the United States.

The Court further finds that while the said John Frank Musial was in the United States Military Service he applied for and was granted War Risk Insurance in the sum of $10,000 on his application dated May 6, 1918, Certificate No. 2094571, for $5,000, and on his application dated July 6, 1918, Certificate No. 4677503, for $5,000; that said insurance was made payable from and after the death of the said John Frank Musial to his sister, Rosa Mortek, plaintiff herein, the same being payable in installments as provided in the War Risk Insurance Act, as amended.

The Court further finds that the said John Frank Musial in and by his said applications authorized

deductions from his active service pay for premiums on said War Risk Insurance in the following language:

> I authorize the necessary monthly deduction from my pay, or, if insufficient, from any deposit with the United States, in payment of the premiums as they become due, unless they be otherwise paid.

And it appearing to the Court that a Regulation of the Bureau of War Risk Insurance, known as T.D. 33 W.R., promulgated September 20, 1918, was in full force and effect at the time of the death of the said John Frank Musial, which said Regulation, among other things, provided as follows:

> The insurance granted under Article V of the War Risk Insurance Act will not be permitted to lapse for nonpayment of premiums while the insured is in the active military or naval service and premiums therefor are authorized to be deducted from the insured's pay or deposit.

NOW, THEREFORE, in view of the foregoing, the Court finds that said War Risk Insurance, applied for and granted to the late John Frank Musial, was in full force and effect at the time of his death.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff, Rosa Mortek, is entitled to the monthly installments on said $10,000 insurance from April 17, 1919, in accordance with the provisions of the War Risk Insurance Act as amended; provided that nothing herein contained shall be taken as determining or affecting the rights of anyone to the installments unpaid on said insurance in the event that the said Rosa Mortek shall die before the same are fully paid.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Noleman, Smith & Dallstream, Counsel for plaintiff, be, and they are hereby allowed a counsel fee of Five Hundred ($500.00) dollars, payable by the plaintiff in the manner provided by law.

(Signed) GEORGE W. ENGLISH,
Judge.

UNITED STATES OF AMERICA,
Eastern District of Illinois:

I, MARSHALL E. DANIELS, Clerk of the District Court of the United States for the Eastern District of Illinois, and keeper of the records and seal thereof, hereby certify that the above and foregoing is a true and perfect copy of the Journal entry in said cause, entered by said court, on the 7th day of July, A.D. 1924, in which Rosa Mortek was plaintiff and the United States, defendant, the same being equity No. 1815, as the same remains on file and of record in my office.

WITNESS my hand and the seal of said Court at my office in the City of East St. Louis, in said Eastern District of Illinois, this 18th day of July, A.D. 1924.

[SEAL] (Signed) MARSHALL E. DANIELS,
Clerk.

By F. G. GOODFELLOW,
Deputy Clerk.

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SUPREME COURT OF THE UNITED STATES.

No. 742.—October Term, 1933.

Bertha Meyer Smith, Petitioner,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[May 21, 1934.]

Mr. Justice McReynolds delivered the opinion of the Court.

By complaint filed in the District Court for Oregon, May 22, 1929, petitioner sought judgment against the United States for benefits said to have accrued to her under War Risk Insurance taken out by her son, Elias Melvin Zimmerman in 1917. While enlisted in the Naval Service he died aboard the U. S. S. "Conestoga" June 30, 1921.

The United States denied liability upon the ground that the policy lapsed for nonpayment of premiums and was not in force after April 30, 1918.

By agreement the cause was tried without a jury. The District Court gave judgment for the complainant—petitioner here; the Circuit Court of Appeals reached a different conclusion and ordered reversal.

There is no dispute in respect of the essential facts.

Zimmerman enlisted in the Navy March 18, 1914, as an apprentice seaman and was honorably discharged at the expiration of his term March 17, 1918; he re-enlisted March 18, 1918, and received an honorable discharge September 15, 1919; he enlisted again September 16, 1919, and served until death. He held a continuous service certificate; but when this was actually received does not appear.* War Risk insurance amounting to $10,000 issued upon his application dated December 3, 1917, which contained the

*Navy Regulations, 1913.

"Paragraph 3529 (1)—Any man who, having been honorably discharged, or discharged with a recommendation for reenlistment, shall within four months thereafter reenlist for four years shall receive in exchange for his discharge a continuous service certificate. . . .

"Paragraph 4427 (22)—If any enlisted man or apprentice, being honorably discharged, shall reenlist for four years within four months thereafter, he

following clause, never formally revoked—"I authorize the necessary monthly deduction from my pay, or if insufficient, from any deposits with the United States in payment of the premiums as they become due, unless they be otherwise paid."

The policy provided for monthly payments in the event of death or total disability occurring while it remained in force. It designated petitioner as the beneficiary. A Bulletin issued by the Director of War Risk Insurance, as authorized by the War Risk Insurance Act, 40 Stat. 398, 409, in force when the policy became effective, contained the following regulation:

"Premiums shall be paid monthly on or before the 1st day of each calendar month and will unless the insured otherwise elects in writing be deducted from any pay due him from the United States or deposit by him with the United States and if so to be deducted a premium when due will be treated as paid whether or not such deduction is in fact made, if upon the due date the United States owe him on account of pay or deposit an amount sufficient to provide the premium; provided that the premium may be paid within thirty-one (31) days after the expiration of the month during which period of grace the insurance shall remain in full force"; also "In case the applicant does not desire the premium to be deducted from his pay he should so state in writing at the time of making application; but if no election is made it shall have the effect to provide for such deduction from his pay or if such pay be insufficient any balance from his deposit."

Payments due upon the policy were met by deductions of $6.50 monthly from the assured's pay until the end of his first enlistment. Thereafter no deduction was made; he executed no new authorization for deductions; no premium was actually met. He was entitled to pay for every day from March 18, 1914, until his death.

When honorably discharged from his first enlistment Zimmerman received the full amount then due him; also, when discharged from his second enlistment. All pay due at his death was received by his mother, the petitioner. The records of the Navy Department "disclose that he never made any allotment for War Risk

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shall, on presenting his honorable discharge or on accounting in a satisfactory manner for its loss, be entitled to a gratuity of four months' pay equal in amount to that which he would have received if he had been employed in actual service. . . ."

Insurance Premiums other than the authorization for deduction of premiums at the time of his application for insurance."

Petitioner insists that although no premium upon the policy was actually paid after March, 1918, it nevertheless remained in full force and effect during the assured's active service because of the unrestricted authorization for deductions in his application of December 3, 1917 never thereafter revoked in writing, since there was due him at the end of each month enough to meet the required premiums and the Navy Department was under a duty to make proper deductions.

In behalf of the United States the insistence is that the authorization for deductions was ineffective after the expiration of the first enlistment during which it was given. Moreover, that the action of the assured in accepting his pay without deduction for premiums during all of his second and third enlistments—more than three years—is enough to show acquiescence in the contemporaneous construction by the administrative officers; and, no circumstance indicating the contrary, this establishes his purpose to surrender the contract as he properly could have done.

We are of opinion there is enough to show abandonment of the contract by the assured and upon that ground the judgment of the Circuit Court of Appeals should be affirmed.

After expiration of the first enlistment, neither party to the contract appears to have treated as operative the authorization for deductions contained in the application. Zimmerman accepted every month during a considerable period the full amount due him; made no effort to provide for payment of premiums when he must have been aware that no deduction had been made. There is nothing to indicate that he did not have full possession of his faculties, or lacked intelligence or probity, or that he was unaware of the important circumstances. If he had supposed the insurance remained in effect, common honesty would have moved him to provide for actual payment of the premiums. He must have known they had not been met. In the circumstances his conduct, we think, adequately indicates the exercise of his right to abandon the policy. See *Sawyer* v. *United States*, 10 Fed. (2d) 416; *United States* v. *Barry*, 67 Fed. (2d) 763; *contra*, *Unger* v. *United States*, 65 Fed. (2d) 946.

The challenged judgment must be

Affirmed.